Supreme Court, U.S.
FILED

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No.

In the Supreme Court
OF THE
United States

VAN NESS ASSOCIATES, LTD.,
Petitioner,

VS.

THE MITSUBISHI BANK, LTD., DRESDNER BANK AG,
CAISSE NATIONALE DE CREDIT AGRICOLE, INSTITUTO BANCARIO
SAN PAOLO DI TORINO, FOREIGN BANKING CORPORATIONS;
AND 1650 MISSION ASSOCIATES, LTD.,
A LIMITED PARTNERSHIP,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION FOUR

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38 pp

QUESTIONS PRESENTED

1. Are lenders constitutionally entitled to no more than payment in full, as stated in *Gelfert v. National City Bank of New York*, 313 U.S. 221 (1941)?

2. Does the Fourteenth Amendment of the United States Constitution prohibit state foreclosure procedures which allow lenders to collect more than payment in full?

3. Does the retroactive application of an expressly non-retroactive statute violate due process?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION FOUR

Petitioner and plaintiff Van Ness Associates, Ltd. ("VNA") respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeal, First Appellate District (per Sepulveda, P.J.) filed on June 10, 1999, on which review as denied by the California Supreme Court on September 15, 1999.

OPINIONS AND ORDERS BELOW

The opinion to which this Petition is addressed is an unreported opinion of Division Four of the First Appellate District of the California Court of Appeal affirming the judgment of dismissal of

the trial court. The relevant portions of the opinion are reproduced in Appendix A. The order of the Supreme Court of the State of California denying review is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeal was entered on June 10, 1999. A timely petition for review was denied by the California Supreme Court on September 15, 1999. This petition for certiorari was filed within 90 days of that date. On December 15, 1999, the clerk of the Supreme Court requested revisions to the form of this petition be made and that the revised petition be resubmitted within 60 days pursuant to Rule 14.5 of the Rules of the Supreme Court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment (U.S. CONST., amend. XIV, § 1) provides:

> [N]or shall any State deprive any person of . . . property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Preliminary Statement

In this age of eBay, E*Trade and now E-LOAN, it is becoming increasingly more important for national judicial guidelines to be established regarding the amount that lenders are able to collect on their loans. This case raises the issue of whether lenders are entitled to collect more than payment in full of their debt in direct contravention of this Court's opinion in *Gelfert v. National City Bank of New York*, 313 U.S. 221 (1941).

B. Background

Petitioner and plaintiff VNA is a California limited partnership with over 100 local investors,[1] which owned a large office building located at 1650 Mission Street in San Francisco, California ("Van Ness Plaza"). (A:2.)[2] Respondents and defendants are four foreign banks, The Mitsubishi Bank, Ltd. (Japan), Dresdner Bank AG (Germany), Caisse Nationale De Credit Agricole (France), Instituto Bancario San Paolo Di Torino (Italy) (the "Mitsubishi Group"), and 1650 Mission Associates, Ltd., a California limited partnership formed by the banks to credit bid and take title at the foreclosure sale on the Van Ness Plaza building. In March of 1995, defendants foreclosed on the property. (A:5.) The banks took ownership of Van Ness Plaza by credit bidding $22.5 million, although the building had been judicially valued at $33.25 million. (A:4-5.)

The foreclosure stemmed from a $36 million refinance loan made by the Mitsubishi Group in 1986. (A:2.) The new loan was a five-year interest-only loan replacing an existing long-term $32 million amortizing loan. (*Id.*) The new loan was arranged by Swiss Bank Corporation, which acted as agent for the Mitsubishi Group on the refinancing. (*Id.*) At the time of the refinance, the building was leased to the Internal Revenue Service. (*Id.*)

The new loan was "non-recourse" with the Mitsubishi Group waiving any personal liability against the borrower, reserving recourse only against the building and any other security. (C:23.) In addition, to taking security in the building, the loan documents gave the Mitsubishi Group immediate ownership of the rents of the

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[1] Most of the investors were senior citizens who were investing retirement funds in the limited partnership.

[2] The letter references before the colon are to the Appendix. The numerical references after the colon are to the page(s).

building by virtue of an absolute assignment. (A:2.)[3] Under California law at the time, an absolute assignment of rents passed immediate ownership to the banks. Cal. Civ. Code § 2938. (D:11.)

In 1989, defendant Mitsubishi Group established a depository account into which all rents from the building were required to be deposited, so that payments to the Mitsubishi Group could be made timely. (A:3.) The depository was known as a "lockbox." (*Id.*) The banks received all rents into the lockbox during the remaining term of the loan. (*Id.*)

In November of 1991, the Mitsubishi loan came due. (A:4.) The banks requested the appointment of a receiver to collect the rents under the absolute assignment. (*Id.*)

As a result of the receivership, plaintiff VNA filed Chapter 11 bankruptcy in July of 1992. (*Id.*) In the course of those proceedings, the bankruptcy court found the value of the Van Ness Plaza building to be $33.25 million. (A:4-5.) In early 1993, SBC, as agent for the Mitsubishi Group, obtained relief from the automatic stay provisions of federal bankruptcy to foreclose on the property. (A:5.)

On March 30, 1995, after several postponements, the Mitsubishi Group conducted a nonjudicial foreclosure sale. (*Id.*) Pursuant to a credit bid of $22.5 million, Mitsubishi assumed ownership of Van Ness Plaza through its newly formed partnership, respondent 1650 Mission Associates, Ltd. (*Id.*) At that time, approximately $46.4 million was claimed owing on the loan because

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[3] Under fundamental analysis, an absolute assignment constitutes only a contract right. By its own specification, it effects an immediate transfer of ownership of the borrowers' rents. It is not a security interest.

the banks had failed to give credit for any of the rents sequestered by the receiver. (*Id.*)

At the time of the foreclosure sale, the receiver had receipted over $17 million in rents and paid operating expenses on the building of approximately $6 million. (*Id.*) Since no payments had been made to the banks, at the date of foreclosure there was a balance of approximately $11.5 million held by the receiver. (*Id.*) Over VNA's objection, that amount was paid over to Mitsubishi after the foreclosure. (*Id.*) The banks kept the rents as well as the building.[4] (*Id.*) The total amount paid under the rents assignment clause during the term of the loan exceeded $22 million. (*Id.*)

C. Procedural History

This action was filed in March of 1996, seeking to set aside the foreclosure, claiming the return of the building or the rents. (A:6.) Defendants demurred, and plaintiff VNA filed its First Amended Verified Complaint (the "Complaint") on January 22, 1997. (*Id.*)

Defendants and respondents demurred to the Complaint on March 27, 1997. (A:7-8.) The trial sustained respondents' demurrer and dismissed VNA's action with prejudice on August 19, 1997. (A:8.) A timely appeal followed. (*Id.*)

The Court of Appeal affirmed the trial court's decision on June 10, 1999. (A:1, 20.) A petition for rehearing to the Court of Appeal was denied on July 12, 1999. A petition for review to the California Supreme Court, raising due process issues, was denied on September 15, 1999. (B:22.)

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[4] The building has increased greatly in value with the resurgent economy and the foreign banks involved have realized a huge windfall.

REASONS FOR GRANTING THE WRIT

A. Lenders Are Constitutionally Entitled To No More Than Payment In Full

Toward the end of the Great Depression, Justice William O. Douglas authored the opinion in *Gelfert v. National City Bank of New York*, 313 U.S. 221 (1941), in which he made his now-famous statement that "mortgagees are constitutionally entitled to no more than payment in full." *Id.* at 233. That case, like ours, involved a foreclosure under real property security which raised an issue of the property's market value.

In *Gelfert*, this Court reviewed a newly enacted New York statute which provided protection against lenders purchasing foreclosed properties at less than market values. Expressing the unanimous opinion of the Court, Justice Douglas recognized that borrowers can become victims in a foreclosure, with their properties being purchased by their lenders — as in our case — at far below market value. At page 233, he stated:

> Underlying that change [in New York law] has been the realization that the price which property commands at a forced sale may be hardly even a rough measure of its value. The paralysis of real estate markets during periods of depression, the wide discrepancy between the money value of property to the mortgagee and the cash price which that property would receive at a forced sale, the fact that the price realized at such a sale may be a far cry from the price at which the property would be sold to a willing buyer by a willing seller reflect the considerations which are motivated departures from the theory that competitive bidding in this field amply protects the debtor.

In announcing the principle that "mortgagees are *constitutionally* entitled to no more than payment in full" (emphasis added),

Justice Douglas cited *Honeyman v. Jacobs*, 306 U.S. 539, 543-545 (1939). That opinion sustained the same New York statute against an attack by a foreclosing bank that the statute constituted an impairment of a contract. Douglas' later pronouncement carried the *Honeyman* decision one step further. *See Gelfert*, 313 U.S. at 233-34. Although Justice Douglas did not announce the exact basis on which his new principle was based, it undoubtedly was the due process clause of the Fourteenth Amendment of the United States Constitution.

The Court of Appeal in our case recognized that an absolute assignment had been created and that a present ownership interest was transferred to the banks under old section 2938 of the Civil Code, which specifically provided that assignments denominated "absolute" transferred a present ownership interest at the time of execution. (A:17, D:24.) But, in the most bizarre part of the Court of Appeal's opinion, while recognizing the principle set forth in *Gelfert, supra* (A:17), it held that an after-the-fact amendment to section 2938, new Civil Code section 2938, subdivision (a) (E:12-22), converted all assignments of rents to a security interest, thereby validating the banks' conduct. (A:17-18.) [5] This is in spite of the fact that the amendment clearly specifies that it is *not* to be

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[5] The amendment was not effective until January 1, 1997, long after the events of this case. It specifically provides that it is not to be retroactive, as follows:

> This section shall apply to contracts entered into or after January 1, 1997. Sections 2938 and 2938.1, as these sections were in effect prior to January 1, 1996, shall govern contracts entered into, and actions and proceedings initiated on the basis of these contracts, prior to January 1, 1997.

(E:31.)

retroactive. Such an erroneous application of an amendment deprives plaintiff of its statutory protection under former section 2938 and denies plaintiff due process of law under the Fourteenth Amendment of the United States Constitution. *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 842-844, 855-856 (1990).

The Court of Appeal based its ruling on a local bankruptcy court case, *In re 500 Ygnacio Associates, Ltd. v. Aetna Life*, 141 Bankr. 191 (1992), to brand the assignment of rents in question a security interest, even though the case failed to discuss the application of Civil Code section 2938. At the same time, the Court of Appeal ignored a Ninth Circuit case, *In re Ventura-Louise Properties*, 490 F.2d 1141 (9th Cir. 1974), and the more recent bankruptcy court case of *In re GOCO Realty Fund I*, 151 Bankr. 241 (Bankr. N.D. Cal. 1993), which held just the opposite. The *In re GOCO Realty Fund I* decision specifically discussed the application of Civil Code section 2938, which applies to our case, in arriving at its opposite conclusion.

Due process is violated by permitting lenders to pocket additional amounts without credit against the debt on the basis of a retroactive statute. Accordingly, the Court of Appeal's holding of retroactivity and failure to apply the rule in *Gelfert* is a denial of due process.

CONCLUSION

It has been a long time since the United States Supreme Court has rendered a decision on lending. We respectfully request that the Supreme Court review the Court of Appeal's defective decision and confirm that the *Gelfert* case is still good law and that the Fourteenth Amendment is violated when a court retroactively allows lenders to receive more than payment in full on a debt.

The petition should be granted and these questions set for plenary consideration. The Court of Appeal should be instructed to return the building or the rents to petitioner VNA in accordance with due process.

Respectfully submitted,

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Dated: February 4, 2000

APPENDIX

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APPENDIX A

Not To Be Published in Official Reports

[Portions of opinion not related to foreclosure issues have been omitted from this Appendix]

In the Court of Appeal of the State of California

First Appellate District

Division Four

A080125 (San Francisco County Super. Ct. No. 977252)

Van Ness Associates, Ltd.,
Plaintiff and Appellant,

v.

Mitsubishi Bank, Ltd., et al.,
Defendants and Respondents.

[Filed June 10, 1999]

Van Ness Associates, Ltd. (VNA) timely appeals from a judgment of dismissal entered after the trial court sustained, without leave to amend, the demurrer of respondents Mitsubishi Bank, Ltd., Dresdner Bank AG, Caisse Nationale De Credit Agricole, Instituto Bancario San Paolo Di Torino, 1650 Mission Associates, Ltd., and Bank of California National Bank (collectively, hereinafter, Mitsubishi or the banks),[1] to VNA's first amended complaint. In that complaint, VNA alleged 10 causes of action including breach of contract, breach of the covenant of good faith and fair dealing,

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[1] Two additional defendants, Richard Deringer and Thomas Leary, are not parties to this appeal.

fraud, and breach of fiduciary duty, all arising out of Mitsubishi's provision of a refinance loan for an office building owned by VNA and the subsequent foreclosure on the property.

The trial court concluded that the first five causes of action were barred by the applicable statute of limitations, and that the remaining five causes of action were not viable as a matter of law. We agree and, accordingly, affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

VNA is a California limited partnership and the former owner of an office building known as "Van Ness Plaza," at 1650 Mission Street in San Francisco. VNA was formed by general partner Richard Deringer in 1982 to acquire and develop Van Ness Plaza. Deringer Development Group, an entity controlled by Deringer, managed Van Ness Plaza on behalf of VNA.

In November 1986, Mitsubishi loaned VNA $36 million. This 1986 refinance loan was a five-year, interest-only loan, which replaced an existing long-term $32 million amortizing loan. Like the pre-existing financing, the 1986 loan was secured by Van Ness Plaza. The 1986 loan was arranged by Swiss Bank Corporation (SBC), acting as agent for Mitsubishi. Swiss Bank Corporation Investment Banking, Inc. (SBCI) acted as financial advisor to VNA in connection with the transaction. At the time of the refinancing, Van Ness Plaza was leased principally to the Internal Revenue Service. The new loan agreement gave Mitsubishi immediate ownership of the rents of the building via an absolute assignment of rents. After the assignment, VNA retained a license to collect and retain the rents in the absence of a declaration by Mitsubishi of a default under the assignment, the deed of trust, or any of the loan documents.

On August 24, 1987 — more than eight years before VNA filed the instant action — Thomas Leary, one of the limited partners of

VNA, brought suit against Deringer alleging gross misconduct in Deringer's management of VNA. Among other things, Leary alleged that Deringer had engaged in a scheme to "realize self-gain by misapplying and wasting the property of [VNA] to the corresponding economic injury and detriment of limited partners in [VNA]." This alleged misapplication of funds included "misapproprat[ing] and divert[ing] substantial sums of money, approximating $1 million, to partnership businesses, corporate or other business entities, in which defendant Deringer has a common financial interest."

On February 21, 1989 — more than seven years before the commencement of this action — Nancy Zimmerman, the controller of the Deringer Development Group from November 1986 through 1988, sued Deringer. Zimmerman alleged she had helped Deringer consummate unauthorized diversions of funds and then was wrongfully terminated for refusing to falsify financial records.

In November 1989 — more than six years before the commencement of this action — the Van Ness II project went into bankruptcy. Less than a month later, on December 1, 1989, Mitsubishi established a depository account into which all rents from Van Ness Plaza were to be deposited so that payments to Mitsubishi would be timely made. This depository arrangement, known as a "Lock Box," commenced on December 1, 1989, and all further rents paid during the life of the loan were received into that account.

On November 22, 1991, Deringer was indicted by the federal grand jury in San Francisco for bank fraud based on allegations that he had engaged in unauthorized transfers of funds. Deringer's numerous financial, legal and criminal problems were widely reported in San Francisco newspapers available to the limited partners from 1989 on. In April 1994, Deringer pleaded guilty to several counts of the indictment and was sentenced to federal prison. He was replaced as general partner by Van Ness Investors, Inc.

(VNI), a new corporation formed by the investors. VNA alleged that, once VNI was in place, VNA discovered the "illegal purpose" of the refinancing and the involvement of Mitsubishi in Deringer's fraudulent scheme.

The 1986 loan was to "mature" on November 30, 1991. Instead of repaying the loan at that time, however, VNA filed a complaint against SBC and SBCI (hereinafter, the Swiss Bank defendants) in San Francisco Superior Court, No. 938826 (hereinafter, the Swiss Bank case). In the Swiss Bank case, VNA sought damages and an injunction to stop the foreclosure on Van Ness Plaza based on causes of action allegedly arising out of the 1986 refinancing transaction. More specifically, VNA alleged that: (1) the 1986 refinancing transaction involved fraud in the inducement by SBC and SBCI; (2) the Swiss Bank defendants concealed from VNA certain facts concerning the refinancing transaction; (3) the Swiss Bank defendants falsely represented that they would arrange to extend or renew the 1986 loan; and (4) 60 days prior to the maturation date, Mitsubishi announced its refusal to extend or renew the loan. In addition, VNA alleged that the Swiss Bank defendants were at all times the agents for Mitsubishi with respect to the 1986 loan transaction, that they conspired with Mitsubishi to deceive VNA into acceding to various demands and changes to the loan agreement, and that VNA was thus relieved from performance of its obligations under the loan agreement with Mitsubishi. These allegations mirror those in the instant action.

The Swiss Bank defendants cross-complained and, on or about December 5, 1991, the trial court appointed Donald Ring as receiver for Van Ness Plaza. The court also dissolved a preliminary injunction that had issued to prevent the foreclosure, saying that VNA's chances of succeeding on the merits were "very, very slim at best."

As a result of the receivership, VNA filed a Chapter 11 bankruptcy petition (see 11 U.S.C. § 362) in July 1992. In the

course of those proceedings, in February 1993, the bankruptcy court found the value of Van Ness Plaza to be $33.25 million. Then in May 1993, SBC — acting as agent for Mitsubishi — obtained relief from the automatic bankruptcy stay in order to foreclose on the property.

On March 30, 1995, after several postponements, Mitsubishi conducted a nonjudicial foreclosure sale. Pursuant to a credit bid of $22.5 million, Mitsubishi assumed ownership of Van Ness Plaza through a newly formed partnership, respondent 1650 Mission Associates, Ltd. At that time, approximately $46.4 million remained owing on the loan.

By that time, Ring had receipted approximately $17 million in rents and had paid operating expenses of the building of approximately $6 million. However, he made no payments to the banks and, at the date of foreclosure, was holding a balance of approximately $11.5 million. Over VNA's objection, that amount was paid over to Mitsubishi pursuant to the assignment of rents. The total amount paid under the assignment thus exceeded $22 million.

On December 29, 1995, VNA filed a motion in the Swiss Bank case, seeking leave to amend its complaint to include the Mitsubishi group (except for Bank of California National Bank)[2] as defendants. In support of its motion, VNA stressed the legal and factual similarity between the claims against the Swiss Bank defendants and its proposed claims against Mitsubishi. For example, VNA argued

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[2] BankCal was named for the first time in the amended complaint in the instant action. Thus, unlike the other respondents, the statute of limitations defense as to BankCal is based on the passage of time from 1991 until January 22, 1997, when the amended complaint was filed. (See *Ingram v. Superior Court* (1979) 98 Cal.App.3d 483, 492.)

that the amended pleading was necessary only "to clarify the existing causes of action and legal theories based on the same facts alleged in the original complaint." VNA further argued that the amendment was justified because the claims against Mitsubishi "arise out of the same transaction and occurrences as against" the Swiss Bank defendants. In response to an argument that the claims against Mitsubishi were barred by the statute of limitations, VNA contended that the amendment "related back" to the original 1991 filing date of the action because "the same facts are involved in the original and the proposed amended pleading." VNA further contended that the foundation of the original complaint and the amended complaint were the same: the alleged fraudulent misconduct of the Swiss Bank defendants and Mitsubishi. VNA also claimed that "the same primary right is at issue" as to the claims against the two groups of defendants.

On February 27, 1996, the superior court denied VNA's motion, saying it had waited too long before seeking leave to amend, but did so without prejudice to its right to file a complaint challenging the foreclosure if it so desired. Subsequently, pursuant to a jury verdict in a bifurcated trial, judgment was entered in favor of the Swiss Bank defendants based on a finding that there was no fiduciary relationship between them and VNA.

VNA's original complaint in the instant case was filed March 29, 1996. By that complaint, VNA sought to set aside the foreclosure, and to recover compensatory and punitive damages. In response to a general demurrer filed by Mitsubishi, VNA filed a first amended complaint on January 22, 1997. The first five causes of action in this amended complaint were denominated as follows: "Fraud/Wrongful Foreclosure (Concealment)/Breach of Fiduciary Duty" (first cause of action); "Aiding and Abetting in Breach of Fiduciary Duty" (second cause of action); "Breach of the Covenant of Good Faith and Fair Dealing" (third cause of action); "Fraud" (fourth cause of action); "Aiding and Abetting in Breach of Fiduciary Duty" (fifth cause of action). The last five counts sought

specific forms of relief from the foreclosure, as follows: damages for unreasonable delay in conducting the foreclosure sale (sixth cause of action); a declaration that the foreclosure was wrongful (seventh cause of action); an order setting aside the foreclosure sale (eighth cause of action); recovery of uncollected rents on the theory that Mitsubishi was a "mortgagee in possession" (ninth cause of action); and an accounting of the foreclosure transaction (tenth cause of action).

More specifically, in the amended complaint, VNA claimed Mitsubishi had colluded with Deringer in a scheme that allowed him to divert rents from Van Ness Plaza for the construction of a new building, "Van Ness II" on an adjacent lot owned by VNA. The Van Ness II project was undertaken by a separate limited partnership, and the refinancing permitted the transfer of ownership of the lot from VNA to that entity. VNA further alleged that the purpose of the refinancing was to reduce the debt service on VNA's property so that Deringer could divert the surplus funds to the new project. VNA claimed that, prior to the refinancing, Van Ness Plaza was a financially sound project and that, after refinancing, it produced a surplus cash flow of approximately $1 million per year. Thus, according to VNA, Deringer was able to siphon off approximately $5 million between 1986 and 1990. At a minimum, however, VNA alleges that, after payment of interest from the Lock Box account, Mitsubishi "returned" to Deringer approximately $2.3 million, which he then diverted for use in his other projects.

VNA admits that a number of its limited partners became aware of the Lock Box arrangement by the end of 1989 and began to make inquiries of Mitsubishi. VNA alleges, however, that Mitsubishi and Deringer concealed the purpose of the loan and agreed to refer all investor inquiries to Deringer and, thus, ensured investors' concerns would be assuaged without exposing the scheme to divert funds.

Mitsubishi demurred to the first amended complaint, contending that the first five causes of action were barred by the applicable

statutes of limitation, and that the remaining claims failed to state a cause of action as a matter of law. The trial court sustained the demurrer without leave to amend and entered judgment dismissing the complaint on August 19, 1997. This timely appeal followed.

II. DISCUSSION

The standard governing our review of an order sustaining a demurrer without leave to amend is well established. We must construe the complaint liberally to determine whether, assuming the truth of the material, well-pleaded facts alleged therein, a cause of action has been stated. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Baltins v. James* (1995) 36 Cal.App.4th 1193, 1996.) We are not limited to the plaintiff's theories of recovery in testing the sufficiency of the complaint, but instead must determine if the allegations of the complaint are adequate to state a cause of action under any legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.) Applying this standard, we readily conclude there was no error in the trial court's ruling on the demurrer.

A. The First Five Causes of Action are Barred by the Applicable Statutes of Limitation.

VNA's principal theory of recovery on the first five causes of action is that Mitsubishi "aided and abetted" Deringer in committing fraud and in breaching fiduciary duties owed to the limited partners of VNA. As VNA observes, "Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. [Citations.]" (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846, citing Rest.2d Torts (1979) § 876, subds. (b), (c).)

Mitsubishi does not seriously dispute that the first five cause of action state a claim under this theory.

VNA must also show, however, that it filed this action within the applicable limitations period for one or more of the first five causes of action pleaded in its complaint or, if not, that there is some viable basis for tolling the statute of limitations as to those claims. Mitsubishi argues, and VNA does not dispute, that the three-year statute of limitations found in Code of Civil Procedure section 338, subdivision (d)[3] governs the first, second, fourth and fifth causes of action. (*April Enterprises, inc. v. KTTV* (1983) 147 Cal.App.3d 805, 827-828, fn. 11 [section 338(d) applies to causes of action for fraud and for breach of fiduciary duty amounting to constructive fraud]; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 596, p. 767 [section 338(d) applies where gravamen of a cause of action of action is fraud, even if pleaded as a contract claim].) Either that provision, or the four-year statute of limitations found in section 337, subdivision 1, governs the third cause of action for breach of the covenant of good faith and fair dealing implied in the loan agreement. (See *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 682-693 [cause of action for breach of the implied covenant of good faith and fair dealing sounds in contract]; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 662 [four-year statute of limitations applies to action on an implied obligation arising out of a written contract].)

As we have noted, the instant action was filed on March 29, 1996. VNA contends that its first five causes of action, all of which sound in fraud, accrued no earlier than April 1994 when Deringer was replaced as general partner by VNI. Only then, VNA alleges, did it have an opportunity to discover Mitsubishi's role in

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[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated. In addition, for convenience, we will refer to section 338, subdivision (d) as section 338(d).

Deringer's fraud. Mitsubishi argues that any claims against it for aiding and abetting Deringer's fraud accrued no later than November 1991, when the refinance loan became due, VNA filed suit against the Swiss Bank defendants and, thereafter, a receiver was appointed for Van Ness Plaza. Assuming a November 1991 accrual date, Mitsubishi argues that both of the potentially applicable statutes of limitation ran against the first five causes of action before VNA commenced this action. Mitsubishi has the better of this argument.

Ordinarily, a cause of action accrues, and the statute of limitations begins to run, upon the occurrence of a wrongful act and when the corresponding obligation or liability arises. (*Lattin v. Gillette* (1892) 95 Cal. 317, 319; *Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 18.) Mere nominal or speculative harm will not trigger the running of the statute of limitations. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200.) But once the innured party has suffered actual and appreciable harm, hgowever uncertain in anmount, the cause of action accrues. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 514.)

As our Supreme Court recently noted, however, certain statutory and case law rules postpone the accrual of a cause of action until a specified event occurs. (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 865, fn. 11.) In particular, a cause of action for fraud does not accrue until "discovery of the facts constituting fraud." (*Ibid.*, citing § 338(d).) "Under ordinary circumstances, a plaintiff may not invoke the aid of a court of equity for relief against fraud after the expiration of the period of limitation for such an action unless he affirmatively pleads that he did not discover the facts constituting the fraud until within three years prior to the date he filed his complaint. [Citation.] The word discovery as used in the statute is not synonymous with knowledge. And the court must determine, as a matter of law, when, under the facts pleaded, there was a discovery by the plaintiff, in the legal sense of that term. Consequently, an averment of lack of knowledge within the statutory

period is not sufficient; a plaintiff must also show that he had no means of knowledge or notice which followed by inquiry would have shown the circumstances upon which the cause of action is founded. Moreover, he must also show when and how the facts concerning the fraud became known to him." (*Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 430; see also *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 875 [if a plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and will be charged with knowledge of matters that would have been discovered by such an investigation]; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 131.) As Witkin explains: "Under this rule, constructive and presume notice or knowledge are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation (such as public records or corporation books), the statute commences to run." (3 Witkin, Cal.Procedure (4th ed. 1996) Actions, § 602, p. 773.) Furthermore, where the plaintiff is a limited partnership, it must prove by a preponderance of the evidence "that it, its agents, accountants, investigators, attorneys, predecessors in interest, and the limited partners and appointee who stood in the same position as a general partner of plaintiff or its agents, accountants, investigators and attorneys did not know or with reasonable diligence should not have known of or discovered the alleged wrongful conduct of defendants [within the applicable limitations period]." (See *Bedolla v. Logan & Frazer*, *supra*, at pp. 125-127 [quoted language was a proper jury instruction on plaintiff limited partnership's burden of proof of timeliness of fraud action].)

In this case, VNA does not dispute that it was aware of Deringer's diversion of partnership funds more than four years before it filed the instant action. Indeed, it would be hard pressed to do so. In its verified amended complaint VNA alleges facts indicating it knew, shortly after the refinancing was in place in 1986, that it was not receiving increased cash distributions, contrary to

what Deringer had represented. As early as 1987, two of Deringer's employees — including Thomas Leary, who was a limited partner of VNA — separately sued Deringer for misappropriating partnership funds. By late 1989, VNA's limited partners had made inquiry of Mitsubishi concerning its awareness of Deringer's diversion of partnership funds and the establishment of the Lock Box arrangement. Around the same time, the limited partners were denied access to partnership financial data and were openly suspicious of Deringer's conduct. Moreover, VNA's books and records disclosed the diversions, and the limited partners had both and absolute right to inspect those books and records, and legal remedies to compel disclosure if inspection was denied. (See Corp. Code, §§ 15634, subd. (b)(1) & 15615, subd. (f).) Finally, and perhaps most revealing, VNA alleged in its 1991 complaint that the Swiss Bank defendants acted as the "agent" and "at the instruction of" Mitsubishi in arranging and administering the 1986 refinance loan, including the institution of the "Lock Box" arrangement in 1989. Indeed, in connection with its attempt to amend the 1991 complaint, VNA argued that Mitsubishi was already "present" in the Swiss Bank action "through their agent, Swiss Bank," and that VNA simply wanted to add the Mitsubishi group as named defendants to vindicate "the same primary right" as against both the Swiss Bank defendants and Mitsubishi.

For similar reasons, we conclude there is no basis for "tolling" the statute of limitations in this case. "It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it. [Citations.] Notwithstanding a defendant's continuing efforts to conceal, if plaintiff discovers the claim independently, the limitations period commences." (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 99, citing *Pashley v. Pacific Elec. Ry. Co.* (1944) 25 Cal.2d 226, 229, and *Kimball v. Pacific Gas & Elec. Co.* (1934) 220 Cal. 203, 210; see also *Barber*

v. Superior Court (1991) 234 Cal.App.3d 1076, 1084 [whatever the lengths to which a defendant has gone to conceal his wrongs, fraudulent concealment will not toll the statute of limitations if a plaintiff is on notice of a potential claim]; *Rita M. v. Roman Catholic Archbishop* (1986) 187 Cal.App.3d 1453, 1460 [same].) "The rationale for the foregoing rule is that the culpable defendant should be estopped from profiting by his own wrong *to the extent* that it hindered an 'otherwise diligent' plaintiff in discovering his cause of action." (*Sanchez v. South Hoover Hospital*, *supra*, at p. 100, quoting *Pashley*, *supra*, at p. 231.)

As we have noted, VNA was clearly on notice of Deringer's wrongdoing and the involvement of Mitsubishi — whether acting on its own or through the Swiss Bank defendants — in the negotiation and administration of the 1986 refinance loan, and at every stage of the allegedly fraudulent scheme. It was free to, and did, conduct discovery in the Swiss Bank action to determine the specific details of that scheme, including the precise roles played by Deringer, the Swiss Bank defendants, and Mitsubishi. "Where the identity of at least one defendant is known, for example, the plaintiff must avail himself of the opportunity to file a timely complaint naming Doe defendants and take discovery." (*Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 937.)

VNA has alleged and contends, however, that the "true purpose" of the refinancing — to allow Deringer to divert funds to the development of Van Ness II, with certain benefits flowing to Mitsubishi and the Swiss Bank defendants — was not revealed until VNI replaced Deringer as its general partner in 1994. This is irrelevant. Although delayed discovery by the plaintiff can delay accrual of a cause of action, the plaintiff "need not be aware of the specific 'facts' necessary to establish the claim," and need not know the identity of every possible defendant. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111, 1114; *Teitelbaum v. Borders* (1962) 206 Cal.App.2d 634, 638-639 [it is not necessary that the aggrieved party know the exact manner in which his injury was effected, nor

the identities of all parties who may have played a role therein].) On the contrary, it was enough that VNA was on notice that it was the victim of an allegedly fraudulent scheme carried out by its general partner and involving the refinancing of its property. At that point, the statute of limitations began running "not only as to known defendants, but also as unknown defendants." (*Bristol-Myers Squibb Co. V. Superior Court* (1995) 32 Cal.App.4th 959, 967.)

Indeed, the facts of this case as alleged by VNA show it knew much more than the identity of a single defendant. VNA knew all along of Mitsubishi's extensive dealings with Deringer in connection with the 1986 refinancing, its demand for the Lock Box arrangement, and its refusal to extend the loan in 1991. VNA was sufficiently suspicious of Mitsubishi's conduct in those respects that it sued the banks' agents in November 1991. In effect, VNA was at that time already charging the Mitsubishi group with wrongdoing and litigating against them through their agents, the Swiss Bank defendants. VNA was also fully on notice of its claim that the refinance loan was part of the fraudulent scheme by Deringer to fleece the partnership. As a matter of law, VNA cannot claim it did not know of, and had no way of discovering, the claims it now asserts against Mitsubishi.

B. The Remaining Claims for Relief Fail as a Matter of Law.

VNA's sixth through tenth causes of action are based on allegations of wrongful conduct by Mitsubishi in carrying out the nonjudicial foreclosure sale. In essence, VNA claims that by collecting over $22 million pursuant to the assignment of rents and subsequently proceeding with a nonjudicial foreclosure sale, Mitsubishi violated the "security first" rule of section 726, and the related anti-deficiency provisions of section 580 et seq. (See *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 999 (*Wozab*).) As the *Wozab* court explained: "'Under California law "the creditor must rely upon his security before enforcing the debt." . . . However, since under section 726 "[t]here can be but one

form of action for the recovery of any debt" secured by a mortgage or deed of trust on real property, where the creditor sues on the obligation and seeks a personal money judgment against the debtor without seeking therein foreclosure of such mortgage or deed of trust, he makes an election of remedies, electing the single remedy of a personal action, and thereby waives his right to foreclose on the security or to sell the security under a power of sale . . . [¶] [S]ection 726 is susceptible of a dual application — it may be interposed by the debtor as an affirmative defense or it may become operative as a sanction. If the debtor successfully raises the section as an affirmative defense, the creditor will be forced to exhaust the security before he may obtain a money judgment against the debtor for any deficiency. . . . If the debtor does not raise the section as an affirmative defense, he may still invoke it as a sanction against the creditor on the basis that the latter by not foreclosing on the security in the action brought to enforce the debt, has made an election of remedies and waived the security.'" (*Wozab*, *supra*, at p. 997, quoting *Walker v. Community Bank* (1974) 10 Cal.3d 729, 733-734; see also *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 38-39.)

Citing *Wozab*, VNA contends that the foreclosure must be set aside because Mitsubishi waived its security by taking action to enforce the absolute assignment of rents, i.e., by instituting the Lock Box arrangement in 1989 and, later, obtaining appointment of a receiver to manage the property and collect rents. At a minimum, VNA claims it is entitled to return of $11 million if the foreclosure sale is allowed to stand. Relying on *MDFC Loan Corp. v. Greenbrier Plaza Partners* (1994) 21 Cal.App.4th 1045 (*MDFC*), and *In re 500 Ygnacio Associates, Ltd.* (Bkrtcy. N.D.Cal. 1992) 141 B.R. 191 (*500 Ygnacio Associates*), the trial court ruled that Mitsubishi was entitled to retain the rents collected pursuant to the assignment and to proceed with judicial foreclosure as well. The trial court was correct.

In *MDFC*, *supra*, 21 Cal.App.4th 1045, the debtor partnership contended that the plaintiff lender was barred from recovering income collected by a receiver, pursuant to an absolute assignment of rents, after the partnership defaulted on the underlying debt. The debtor claimed that allowing the creditor to take the rents would violate the prohibition against recovery of a deficiency judgment, and that the creditor's sole remedy was a nonjudicial foreclosure sale in which it obtained title to the property by a successful full credit bid. (*Id.* at p. 1053.) The Fourth Appellate District rejected the debtor's arguments, and reversed a trial court order awarding rents to the debtor. (*Id.* at pp. 1053-1056.) The *MDFC* court held that it was not a violation of the anti-deficiency statutes for a secured lender to credit against the shortfall remaining after a trustee's sale all the rents assigned to it under the terms of the loan, and that a beneficiary under a deed of trust may enforce its interests in both the real property security and in an absolute assignment of rents without running afoul of the anti-deficiency statutes. (*Id.* at pp. 1053-1055.)

In *500 Ygnacio Associates*, *supra*, 141 B.R. 191, the federal court applied California law and rejected the additional arguments made by VNA in this case. (*Id.* at pp. 195-196.) In *500 Ygnacio Associates*, the debtor defaulted on a $18.9 million loan secured by certain real property as to which Aetna Life Insurance Co. held a deed of trust and an absolute assignment of rents conditional only on the debtor's default. (*Id.* at p. 191.) Aetna filed a state court action for appointment of a receiver and simultaneously, as permitted by the assignment agreement, directed the tenants of the real property to begin paying rents to it. Aetna collected approximately $200,000 pursuant to the assignment of rents, and did not apply any of that amount to the operating expenses of the building. (*Id.* at pp. 1910-192.) Before a receiver could be appointed, the debtor filed a bankruptcy petition, staying the state court action. (*Id.* at p. 192, fn. 1.) In bankruptcy court, the debtor filed an adversary complaint requesting a determination that the defendant creditor had waived its security interest by collecting the rents and applying that amount to

the debt prior to foreclosure. (*Id.* at pp. 191-192.) The debtor argued that section 726 required Aetna to refrain from collecting the rents until it exhausted its real property security and that, having proceeded under the assignment of rents, it waived its security interest. The bankruptcy court found no support in California law for such a claim. (*500 Ygnacio Associates*, *supra*, at pp. 195-196.)

At the heart of VNA's argument under section 726 is a claim that an absolute assignment of rents transfers something other than a security interest to the creditor, and that the result in *MDFC*, *supra*, 21 Cal.App.4th 1045, turns on the fact that the case involved a "multiple security situation." (*Id.* at p. 1054.) The *500 Ygnacio Associates* court disposed of this argument as well, pointing out that a creditor's application of its own property would not constitute a debt collection device for purposes of section 726. (141 B.R. at p. 195, fn. 4.) Likewise, if the creditor were the true owner of the rents, its right to payment of the rents would exist independent of the debt, thereby entitling the creditor, contrary to settled law, to payment of an amount in excess of the debt. (*Id.* at pp. 195-196; see also *Eastland S. & L. Assn. v. Thornhill & Bruce, Inc.* (1968) 260 Cal.App.2d 259, 261-262.)

VNA further contends that Civil Code former section 2938 — which provided that an absolute assignment of rents effectuated a "present transfer of the assignor's interest" — supports its argument that by proceeding under the absolute assignment of rents, Mitsubishi violated the security first rule and forfeited its security pursuant to section 726. VNA relies solely on the fact that the 1996 amendments of that section — which included a provision that an absolute assignment of rents shall "upon execution and delivery by the assignor, be effective to create a present security interest" (Civ. Code, § 2938, subd. (a)) — were expressly made not retroactive (*id.*, subd. (i)). VNA is wrong. The 1996 amendments (Stats 1996, ch. 49, § 2 No. 3 West's Cal. Legis. Service, p. 196) were intended to clarify that the result in *500 Ygnacio Associates* was proper under section 726, and that a depublished California case reaching

a contrary result was wrongly decided. That is, the Legislature intended to reaffirm "that the demand, collection and application of rents to indebtedness do not constitute violations of the security first rule or the one-action rule." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 947 (1995 Reg. Sess.), as amended June 7, 1995.)

VNA further contends that the foreclosure sale was "wrongful" because Mitsubishi delayed the sale for two years. That is, VNA suggests Mitsubishi acted improperly by waiting until the real estate market hit "rock bottom," thus allowing Mitsubishi to buy the property for a [sic] unreasonably low price and rendered the foreclosure "oppressively unfair." In addition, VNA claims Mitsubishi "chilled" the participation of other prospective bidders by overstating VNA's debt by more than $11 million. These arguments make little sense and, in any event, afford no basis for relief from foreclosure.

In the first place, Mitsubishi had absolute discretion to call for a foreclosure sale at any time after expiration of the period for redemption or reinstatement, under section 3.17(c)(v)(B) of the deed of trust, which provided: "Beneficiary may cause any such sale or other disposition to be conducted immediately following the expiration of any grace period, if any, herein provided, or immediately upon the expiration of any redemption or reinstatement period required by law, or Beneficiary may delay any such sale or other disposition for such time as Beneficiary deems to be in its best interest." To the extent VNA claims the covenant of good faith and fair dealing required Mitsubishi to conduct an earlier sale, VNA is wrong. The implied covenant cannot be read to prohibit what a contract expressly permits or to vary the terms of a written contract. (See *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374.)

Furthermore, any "delay" in conducting the nonjudicial foreclosure sale did not cause any harm to appellant. VNA posits no scenario — and we can imagine none — under which it would

have been entitled to any of the proceeds of the foreclosure sale. (See Civ. Code § 2824k.) Assuming Van Ness Plaza could have been sold for the $33.25 million value established by the bankruptcy court, VNA still would have owed Mitsubishi approximately $13.15 million. Even if VNA were fully credited with the $11 million in net rental income, there would have been a $2 million shortfall.

VNA has also failed to allege the existence of any other buyer who was ready, willing, and able to pay the asserted $33.25 million market value, and has never suggested it made a valid tender of the full amount owing under the finance loan. Without such allegations, VNA cannot state a viable cause of action to set aside the foreclosure sale. (See *FPCI RE-HAB 01 v. E & G Investments* (1989) 207 Cal.App.3d 1018, 1023-1024; *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578-579; *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117, 121.)

Finally, in its tenth cause of action, VNA contends it is entitled to an accounting of the rents received by Mitsubishi pursuant to the assignment and full disclosure of how the proceeds of the foreclosure sale were disbursed. The information VNA seeks has either already been provided or the time for seeking relief has expired.

As for rents collected by Mitsubishi from December 1989 to December 1991 pursuant to the Lock Box arrangement, any claim for an accounting is time-barred. Any cause of action VNA might have had in this regard would have arisen out of the deed of trust, would have begun to accrue in December 1989, and was subject to, at most, the four-year statute of limitations of section 337 subdivision 1. (See *Azevedo v. Azevedo* (1942) 54 Cal.App.2d 486, 489-491; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 474, pp. 597-598.)

As for the rents collected by the receiver, VNA's opportunity for an "accounting" was in the discharge and winding up of the

receivership estate. As an independent officer of the court, the receiver was obligated to preserve any funds coming into his possession for all parties to the action. (See Code Civ. Proc., § 568; *Pacific Railway Co. v. Wade* (1891) 91 Cal. 449, 451-452.) In this case, moreover, the amounts and the parties' entitlement to the proceeds of the receivership estate were already litigated in the Swiss Bank case, and the judgment in that case is now final. If VNA were dissatisfied with the receiver's action, its remedy was to appeal in that action. Having stipulated to the dismissal of its appeal in that case in July 1998, VNA is now foreclosed from relitigating the matter in the guise of an action for an accounting.

As for VNA's demand for information about the amount of principal, interest, and other charges incurred in connection with the foreclosure, Civil Code section 2943 prescribes mandatory and very short deadlines for requesting and providing such information, all of which are tied very closely to the date of the foreclosure sale. Demand for a detailed "beneficiary statement" may be made at any time before or within two months after recording of a notice of default under a deed of trust. (*Id.*, subd. (b)(2).) Where the loan is subject to a recorded notice of default or a complaint initiating judicial foreclosure, "the beneficiary shall have no obligation to prepare and deliver . . . [a payoff] statement . . . unless the written demand is received prior to the first publication of a notice of sale." (*Id.*, subd. (c).) VNA does not dispute that its complaint in this case, which was filed nearly two years after the foreclosure sale, was the first time it made a demand for the details of the foreclosure sale. All of the deadlines prescribed by Civil Code section 2943 had, by then, long since passed. Any right to an accounting of the foreclosure sale that VNA might have had no longer exists.

III. CONCLUSION

For all the foregoing reasons, the judgment of the trial court is affirmed in its entirety. Costs to respondents.

Sepulveda, J.

We concur:

Hanlon, P.J.

Reardon, J.

APPENDIX B

First Appellate District, Division Four, No. A080125
S080739
In the Supreme Court of California

[Filed September 15, 1999]

Van Ness Associates, Ltd., Appellant,

v.

Mitsubishi Bank, Ltd., et al., Respondents.

Petition for review DENIED.

BAXTER
Acting Chief Justice

APPENDIX C

The Credit Agreement executed by and between VNA, "Agent" Swiss Bank Corporation, and the Mitsubishi Group on November 26, 1986, provides that the lenders' "sole" recourse must be through foreclosure on the "Property" that is the subject of the deed of trust. (¶ 2.12(a)) The section reads as follows:

> Notwithstanding anything to the contrary set forth in this Agreement (subject to clause 2.12(b)) or the Term Notes, the Borrower and the Partner thereof shall have no personal liability with respect to the obligations evidenced by this Agreement and the Term Notes and secured by the Deed of Trust to repay principal and to pay interest or any prepayment fees or other charges. The Banks waive any such personal liability and agree that, subject to this section 2.12, in the event of the occurrence of an Event of Default under Article VIII, the recourse of the Banks with respect to the obligations hereunder shall be solely to the Property covered by the Deed of Trust and any other security instrument securing the obligations hereunder and the only remedy of the Agent or the Banks shall be the foreclosure on the Property by power of sale as provided in the Deed of Trust or by judicial foreclosure with no deficiency judgment against the Borrower or against the Partner.

APPENDIX D

CAL. CIVIL CODE 2938, repealed by
STATS. 1996, ch. 49, § 1

§ 2938. Assignment of rents; recordation

(a) A written assignment of interest in rents, issues, and profits of real property made in connection with a loan secured by real property, stating that it is absolute, shall be deemed to constitute a present transfer of the assignor's interest in existing and future rents, issues, and profits of that real property effective upon the execution and delivery of the assignment by the assignor.

(b) An assignment of an interest in rents, issues, and profits of real property, as described in subdivision (a), may be recorded in the records of the county recorder in which the real property is located in the same manner as any other conveyance of an interest in real property, whether the assignment is in a separate document or part of a mortgage or deed of trust, and when so duly recorded in accordance with the methods, procedures, and requirements for recordation of conveyances of other interests in real property, (1) the assignment shall be deemed to give constructive notice of the content and effect of the assignment with the same force and effect as any other duly recorded conveyance of an interest in real property, and (2) the interest granted by the assignment shall be deemed perfected as of the date of recordation, notwithstanding any provision of the assignment or of any other provision of law that would otherwise preclude or defer enforcement of the rights granted the assignee under the assignment until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor.

APPENDIX E

CAL. CIVIL CODE 2938, added by
STATS. 1996, ch. 49 (S.B. 947), § 2

§ 2938. Assignment of rents; recordation; enforcement; demand; cash proceeds; application of section

(a) A written assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by real property, irrespective of whether the assignment is denoted as absolute, absolute conditioned upon default, additional security for an obligation, or otherwise, shall, upon execution and delivery by the assignor, be effective to create a present security interest in existing and future leases, rents, issues, or profits of that real property. As used in this section, "leases, rents, issues, and profits of real property" include the cash proceeds thereof. The term "cash proceeds" means cash, checks, deposit accounts, and the like.

(b) An assignment of an interest in leases, rents, issues, or profits of real property may be recorded in the records of the county recorder in which the underlying real property is located in the same manner as any other conveyance of an interest in real property, whether the assignment is in a separate document or part of a mortgage or deed of trust, and when so duly recorded in accordance with the methods, procedures, and requirements for recordation of conveyances of other interests in real property, (1) the assignment shall be deemed to give constructive notice of the content of the assignment with the same force and effect as any other duly recorded conveyance of an interest in real property and (2) the interest granted by the assignment shall be deemed fully perfected as of the time of recordation with the same force and effect as any other duly recorded conveyance of an interest in real property, notwithstanding any provision of the assignment or any provision of law that would otherwise preclude or defer enforcement of the rights granted the

assignee under the assignment until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor, or the assignee's obtaining possession of the real property or the appointment of a receiver.

(c) Upon default of the assignor under the obligation secured by the assignment of leases, rents, issues, and profits, the assignee shall be entitled to enforce the assignment in accordance with this section. On and after the date the assignee takes one or more of the enforcement steps described in this subdivision, the assignee shall be entitled to collect and receive all rents, issues, and profits that have accrued but remain unpaid and uncollected by the assignor or its agent or for the assignor's benefit on that date, and all rents, issues, and profits that accrue on or after the date. The assignment shall be enforced by one or more of the following:

(1) The appointment of a receiver.

(2) Obtaining possession of the rents, issues, or profits.

(3) Delivery to any one or more of the tenants of a written demand for turnover of rents, issues, and profits in the form specified in subdivision (j), a copy of which demand shall also be delivered to the assignor; and a copy of which shall be mailed to all other assignees of record of the leases, rents, issues, and profits of the real property at the address for notices provided in the assignment or, if none, to the address to which the recorded assignment was to be mailed after recording.

(4) Delivery to the assignor of a written demand for the rents, issues, or profits, a copy of which shall be mailed to all other assignees of record of the leases, rents, issues, and profits of the real property at the address for notices provided in the assignment or, if none, to the address to which the recorded assignment was to be mailed after recording.

Moneys received by the assignee pursuant to this subdivision, net of amounts paid pursuant to subdivision (g), if any, shall be applied by the assignee to the debt or otherwise in accordance with the assignment or the promissory note, deed of trust, or other instrument evidencing the obligation; provided, however, that neither the application nor the failure to so apply the rents, issues, or profits shall result in a loss of any lien or security interest which the assignee may have in the underlying real property or any other collateral, render the obligation unenforceable, constitute a violation of Section 726 of the Code of Civil Procedure, or otherwise limit any right available to the assignee with respect to its security.

(d) If an assignee elects to take the action provided for under paragraph (3) of subdivision (c), the demand provided for therein shall be signed under penalty of perjury by the assignee or an authorized agent of the assignee and shall be effective as against the tenant when actually received by the tenant at the address for notices provided under the lease or other contractual agreement under which the tenant occupies the property or, if no address for notices is so provided, at the property. Upon receipt of this demand, the tenant shall be obligated to pay to the assignee all rents, issues, and profits that are past due and payable on the date of receipt of the demand, and all rents, issues, and profits coming due under the lease following the date of receipt of the demand, unless either of the following occurs:

(1) The tenant has previously received a demand which is valid on its face from another assignee of the leases, issues, rents, and profits sent by the other assignee in accordance with this subdivision and subdivision (c).

(2) The tenant, in good faith and in a manner which is not inconsistent with the lease, has previously paid, or within 10 days following receipt of the demand notice pays, the rent to the assignor.

Payment of rent to an assignee following a demand under an assignment of leases, rents, issues, and profits shall satisfy the tenant's obligation to pay the amounts under the lease. If a tenant pays rent to the assignor after receipt of a demand other than under the circumstances described in this subdivision, the tenant shall not be discharged of the obligation to pay rent to the assignee, unless the tenant occupies the property for residential purposes. The obligation of a tenant to pay rent pursuant to this subdivision and subdivision (c) shall continue until receipt by the tenant of a written notice from a court directing the tenant to pay the rent in a different manner or receipt by the tenant of a written notice from the assignee from whom the demand was received canceling the demand, whichever occurs first. Nothing in this subdivision shall affect the entitlement to rents, issues, or profits as between assignees as set forth in subdivision (h).

(e) No enforcement action of the type authorized by subdivision (c), and no collection, distribution, or application of rents, issues, or profits by the assignee following an enforcement action of the type authorized by subdivision (c), shall do any of the following:

(1) Make the assignee a mortgagee in possession of the property, except if the assignee obtains actual possession of the real property, or an agent of the assignor.

(2) Constitute an action, render the obligation unenforceable, violate Section 726 of the Code of Civil Procedure or, other than with respect to marshaling requirements, otherwise limit any rights available to the assignee with respect to its security.

(3) Be deemed to create any bar to a deficiency judgment pursuant to any provision of law governing or relating to deficiency judgments following the enforcement of any encumbrance, lien, or security interest, notwithstanding that the action, collection, distribution, or application may reduce the indebtedness secured by the assignment or by any deed of trust or other security instrument.

The application of rents, issues, or profits to the secured obligation shall satisfy the secured obligation to the extent of those rents, issues, or profits, and, notwithstanding any provisions of the assignment or other loan documents to the contrary, shall be credited against any amounts necessary to cure any monetary default for purposes of reinstatement under Section 2924c.

(f) If cash proceeds of rents, issues or profits to which the assignee is entitled following enforcement as set forth in subdivision (c) are received by the assignor or its agent for collection or by any other person who has collected such rents, issues, or profits for the assignor's benefit, or for the benefit of any subsequent assignee under the circumstances described in subdivision (h), following the taking by the assignee of either of the enforcement actions authorized in paragraph (3) or (4) of subdivision (c), and the assignee has not authorized the assignor's disposition of the cash proceeds in a writing signed by the assignee, the rights to the cash proceeds and to the recovery of the cash proceeds shall be determined by the following:

(1) The assignee shall be entitled to an immediate turnover of the cash proceeds received by the assignor or its agent for collection or any other person who has collected the rents, issues, or profits for the assignor's benefit, or for the benefit of any subsequent assignee under the circumstances described in subdivision (h), and the assignor or other described party in possession of such cash proceeds shall turn over the full amount of cash proceeds to the assignee, less any amount representing payment of expenses authorized by the assignee in writing. The assignee shall have a right to bring an action for recovery of the cash proceeds, and to recover the cash proceeds, without the necessity of bringing an action to foreclose any security interest which it may have in the real property. This action shall not violate Section 726 of the Code of Civil Procedure or otherwise limit any right available to the assignee with respect to its security.

(2) As between an assignee with an interest in cash proceeds perfected in the manner set forth in subdivision (b) and enforced in accordance with paragraph (3) or (4) of subdivision (c) and any other person claiming an interest in the cash proceeds, other than the assignor or its agent for collection or one collecting rents, issues, and profits for the benefit of the assignor, and subject to subdivision (h), the assignee shall have a continuously perfected security interest in the cash proceeds to the extent that the cash proceeds are identifiable. For purposes hereof, cash proceeds are identifiable if they are either (A) segregated or (B) if commingled with other funds of the assignor or its agent or one acting on its behalf, can be traced using the lowest intermediate balance principle, unless the assignor or other party claiming an interest in proceeds shows that some other method of tracing would better serve the interests of justice and equity under the circumstances of the case. The provisions of this paragraph are subject to any generally applicable law with respect to payments made in the operation of the assignor's business.

(g)(1) If the assignee enforces the assignment under subdivision (c) by any means other than the appointment of a receiver and receives rents, issues, or profits pursuant to this enforcement, the assignor or any other assignee of the affected real property may make written demand upon the assignee to pay the reasonable costs of protecting and preserving the property, including payment of taxes and insurance and compliance with building and housing codes, if any.

(2) On and after the date of receipt of the demand, the assignee shall pay for the reasonable costs of protecting and preserving the real property to the extent of any rents, issues, or profits actually received by the assignee; provided, however, that no such acts by the assignee shall cause the assignee to become a mortgagee in possession and the assignee's duties under this subdivision, upon receipt of a demand from the assignor or any other assignee of the leases, rents, issues, and profits pursuant to paragraph (1), shall not be construed to require the assignee to operate or manage the property, which obligation shall remain that of the assignor.

(3) The obligation of the assignee hereunder shall continue until the earlier of (A) the date on which the assignee obtains the appointment of a receiver for the real property pursuant to application to a court of competent jurisdiction, or (B) the date on which the assignee ceases to enforce the assignment.

(4) Nothing in this subdivision shall be construed to supersede or diminish the right of the assignee to the appointment of a receiver.

(h) The lien priorities, rights, and interests among creditors concerning rents, issues, or profits collected before the enforcement by the assignee shall be governed by subdivisions (a) and (b). Without limiting the generality of the foregoing, if an assignee who has recorded its interest in leases, rents, issues, and profits prior to the recordation of such interest by a subsequent assignee seeks to enforce its interest in those rents, issues, or profits in accordance with this section after any enforcement action has been taken by a subsequent assignee, the prior assignee shall be entitled only to the rents, issues, and profits that are accrued and unpaid as of the date of its enforcement action and unpaid rents, issues, and profits accruing thereafter. The prior assignee shall have no right to rents, issues, or profits paid prior to the date of the enforcement action, whether in the hands of the assignor or any subsequent assignee. Upon receipt of notice that the prior assignee has enforced its interest in the rents, issues, and profits, the subsequent assignee shall immediately send a notice to any tenant to whom it has given notice under subdivision (c). The notice shall inform the tenant that the subsequent assignee cancels its demand that the tenant pay rent to the subsequent assignee.

(i) This section shall apply to contracts entered into on or after January 1, 1997. Sections 2938 and 2938.1, as these sections were in effect prior to January 1, 1996 , shall govern contracts entered into, and actions and proceedings initiated on the basis of these contracts, prior to January 1, 1997.'

(j) "Real property," as used in this section, shall mean real property or any estate or interest therein.

(k) The demand required by paragraph (3) of subdivision (c) shall be in the following form:

DEMAND TO PAY RENT TO PARTY OTHER THAN LANDLORD (SECTION 2938 OF THE CIVIL CODE)

Tenant: [Name of Tenant]

Property Occupied by Tenant: [Address]

Landlord: [Name of Landlord]

Secured Party: [Name of Secured Party]

Address: [Address for Payment of Rent to Secured Party and for Further Information]:

The secured party named above is the assignee of leases, rents, issues, and profits under [name of document] dated _____, and recorded at [recording information] in the official records of _____ County, California. You may request a copy of such assignment from the secured party at _____ (address).

THIS NOTICE AFFECTS YOUR LEASE OR RENTAL AGREEMENT RIGHTS AND OBLIGATIONS. YOU ARE THEREFORE ADVISED TO CONSULT AN ATTORNEY CONCERNING THOSE RIGHTS AND OBLIGATIONS IF YOU HAVE ANY QUESTIONS REGARDING YOUR RIGHTS AND OBLIGATIONS UNDER THIS NOTICE.

IN ACCORDANCE WITH SUBDIVISION (C) OF SECTION 2938 OF THE CIVIL CODE, YOU ARE HEREBY DIRECTED TO PAY TO THE SECURED PARTY, _____ (NAME OF

SECURED PARTY) AT _____ (ADDRESS), ALL RENTS UNDER YOUR LEASE OR OTHER RENTAL AGREEMENT WITH THE LANDLORD OR PREDECESSOR IN INTEREST OF LANDLORD, FOR THE OCCUPANCY OF THE PROPERTY AT _____ (ADDRESS OF RENTAL PREMISES) WHICH ARE PAST DUE AND PAYABLE ON THE DATE YOU RECEIVE THIS DEMAND, AND ALL RENTS COMING DUE UNDER THE LEASE OR OTHER RENTAL AGREEMENT FOLLOWING THE DATE YOU RECEIVE THIS DEMAND UNLESS YOU HAVE ALREADY PAID THIS RENT TO THE LANDLORD IN GOOD FAITH AND IN A MANNER NOT INCONSISTENT WITH THE AGREEMENT BETWEEN YOU AND THE LANDLORD. IN THIS CASE, THIS DEMAND NOTICE SHALL REQUIRE YOU TO PAY TO THE SECURED PARTY _____, (NAME OF THE SECURED PARTY), ALL RENTS THAT COME DUE FOLLOWING THE DATE OF THE PAYMENT TO THE LANDLORD.

IF YOU PAY THE RENT TO THE UNDERSIGNED SECURED PARTY, _____ (NAME OF SECURED PARTY), IN ACCORDANCE WITH THIS NOTICE, YOU DO NOT HAVE TO PAY THE RENT TO THE LANDLORD. YOU WILL NOT BE SUBJECT TO DAMAGES OR OBLIGATED TO PAY RENT TO THE SECURED PARTY IF YOU HAVE PREVIOUSLY RECEIVED A DEMAND OF THIS TYPE FROM A DIFFERENT SECURED PARTY.

[For other than residential tenants]. IF YOU PAY ANY RENT TO THE LANDLORD THAT BY THE TERMS OF THIS DEMAND YOU ARE REQUIRED TO PAY TO THE SECURED PARTY, YOU MAY BE SUBJECT TO DAMAGES INCURRED BY THE SECURED PARTY BY REASON OF YOUR FAILURE TO COMPLY WITH THIS DEMAND, AND YOU MAY NOT BE DISCHARGED FROM YOUR OBLIGATION TO PAY SUCH RENT TO THE SECURED PARTY. YOU WILL NOT BE SUBJECT TO SUCH DAMAGES OR OBLIGATED TO PAY

SUCH RENT TO THE SECURED PARTY IF YOU HAVE PREVIOUSLY RECEIVED A DEMAND OF THIS TYPE FROM A DIFFERENT ASSIGNEE.

Your obligation to pay rent under this demand shall continue until you receive either (1) a written notice from a court directing you to pay the rent in a manner provided therein, or (2) a written notice from the secured party named above canceling this demand.

The undersigned hereby certifies, under penalty of perjury, that the undersigned is an authorized officer or agent of the secured party and that the secured party is the assignee, or the current successor to the assignee, under an assignment of leases, rents, issues, or profits executed by the landlord, or a predecessor in interest, that is being enforced pursuant to and in accordance with Section 2938 of the Civil Code.

Executed at _____, California, this _____ day of _____, _____.

(Added by STATS. 1996, ch. 49 (S.B. 947), § 2.)

[1] So in enrolled bill.